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In The
Supreme Court of The United States

ART MANNING,

PETITIONER,

V.

MCGRAW-HILL, INC.,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

David A. Lane*
Paula Greisen
John T. Carlson
Miller, Lane, Killmer & Greisen, LLP
730 17th Street, Suite 600
Denver, Colorado 80202
(303) 534-6400

Attorneys for Petitioner

***Counsel of Record**

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QUESTION PRESENTED

Should this case be remanded for reconsideration in light of this Court's opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, which was decided the day before the Tenth Circuit issued its opinion reversing a jury verdict for an employee in a case brought under the Age Discrimination In Employment Act by finding an insufficiency of the evidence under Fed. Rule Civ. Proc. 50, when the circuit court neither applied nor mentioned this Court's ruling in *Reeves*, and subverted the authority of this Court and the jury by disregarding all evidence favorable to the employee and crediting disputed evidence favorable to the employer?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported. It is attached to this petition as an appendix. The memorandum opinion by the district court, denying Respondent's Rule 50 motion for judgment as a matter of law, is similarly unreported. It too is attached as an appendix, as is the Tenth Circuit's denial of Petitioner's request for rehearing.

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Tenth Circuit reversing the decision of the district court was entered on June 13, 2000. A petition for rehearing was denied on July 19, 2000. This petition for writ of certiorari is filed within 90 days of that date.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute construed is the Age Discrimination in Employment Act, 29 U.S.C. § 623(a), which says: "It shall be unlawful for an employer—(1) . . . to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age . . ."

STATEMENT OF THE CASE

A jury in the United States District Court for the District of Colorado found that Petitioner, Art Manning, was fired because of his age. The United States Court of Appeals for the Tenth Circuit reversed, holding that Respondent, McGraw-Hill, Inc., was entitled to judgment as a matter of law under Fed. Rule. Civ. Proc. 50. The court of appeals said there was insufficient evidence to support the jury's verdict.

For more than thirteen years, Manning was an account executive at a television station in Denver, Channel 7-KMGH. The station is owned by McGraw-Hill. For twelve of those years, Manning, who sold advertising to local and national customers, was widely esteemed for his work. He consistently received outstanding performance evaluations; he regularly exceeded his sales targets; and he received recognition for his dedication and outstanding efforts, ranging from written commendations from the company's chief executive to winning expensive vacation junkets.

Things took a dramatic turn for the worse in 1991, when new management arrived at Channel 7. Bringing with them an emphasis on youth and vigor, which they thought would boost the fortunes of Denver's lowest-rated network affiliate, the new managers began eliminating older workers from the sales department and hiring younger employees in their place. Soon their attention turned to Manning, age 49. Their efforts to unload the veteran sales executive began by stripping him of his three largest accounts, Toyota, Lexus, and Coca-Cola, all of which were given to younger employees. Then, following a steady campaign of mounting criticism by his supervisors, McGraw-Hill fired Manning.

Manning filed suit against his former employer, alleging that his termination violated the Age Discrimination in Employment Act. After a five-day trial in 1997, the jury agreed and awarded him damages of $324,900. It also found that McGraw-Hill's conduct was willful, entitling Manning to liquidated damages of twice the jury's verdict.

McGraw-Hill filed post-trial motions under Rule 50 seeking judgment as a matter of law, or, alternatively, a new trial on the issues of liability and damages. The district court denied the motion for judgment as a matter of law as well as the motion seeking a new trial on liability. It did, however, issue a remittitur on the question of damages, forcing Manning to elect between a reduced damage award or face a

new trial on damages only. Manning accepted the remittitur, reducing his award to $401,000.

McGraw-Hill appealed. The Tenth Circuit reversed the district court's denial of the Rule 50 motion. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I

The Tenth Circuit Did Not Consider—Indeed, Never Mentioned — a Recently Decided and Now Controlling Opinion of This Court.

One day before the panel overturned Manning's jury verdict, this Court decided *Reeves v. Sanderson Plumbing Products Inc.*, __ U. S. __, 120 S. Ct. 2097 (2000). *Reeves*, which now governs cases concerning the kind and amount of evidence necessary to prove intentional discrimination, is impossible to reconcile with the panel's decision. It was never mentioned, much less analyzed by the panel.

A. Reeves v. Sanderson Plumbing Products: A Seminal Method of Proof Case

Roger Reeves, 57 years old, was fired from Sanderson Plumbing Products. At trial, Sanderson claimed it fired Reeves because he failed to maintain accurate attendance records, but Reeves countered with evidence showing that his record keeping, in fact, was proper and, contrary to the company's assertions, he had never falsified any information. The jury returned a verdict in favor of Reeves.

The Fifth Circuit reversed, holding that Reeves had not introduced evidence sufficient to sustain the jury's finding of unlawful discrimination. *Reeves v. Sanderson Plumbing Products*, 197 F. 3d 688, 694 (5th Cir. 1999). Specifically, the

Fifth Circuit stated that several age-related comments by a Sanderson manager were isolated remarks, not sufficiently connected with Reeves's dismissal to establish that the decision itself was discriminatory. The court of appeals also said there was no evidence that other managers involved in Reeves's termination were motivated by age. Finally, the court noted, two of the decision-makers responsible for the discharge were over the age of 50. *Id.* at 693-94. For these reasons, the court concluded that Reeves had not presented sufficient evidence for a rational jury to find he had been discharged because of his age, despite that he "may well have" offered sufficient evidence for a "reasonable jury [to] have found that [the employer's] explanation for its employment decision was pretextual." *Id.* at 693.

Reversing the lower court, this Court reinstated the jury's verdict in favor of Reeves. "[T]he Court of Appeals," said Justice O'Connor for a unanimous Court, ignored the evidence suggesting petitioner's prima facie case and challenging respondent's explanation for its decision." *Reeves v. Sanderson Plumbing Products Inc.*, 120 S. Ct. at 2108. She added that the Fifth Circuit "misconceived" the evidentiary burden placed on plaintiffs who attempt to prove intentional discrimination through indirect evidence. *Id.*

Reeves carefully explained just why evidence of pretext is so probative of intentional discrimination. A jury, said the Court, can reasonably infer from the falsity of the employer's explanation that the employer is "dissembling to cover up a discriminatory purpose." *Id.* Once an employer's justification has been discredited, "discrimination may well be the most likely alternative explanation." *Id.* at 2108-09. Thus while proof that the defendant's explanation is unworthy of belief is "simply one form of circumstantial evidence," it may nevertheless "be quite persuasive." *Id.* at 2108.

B. Failure to Mention Reeves Requires Summary Reconsideration

In this case, Manning's allegations of intentional discrimination rested on circumstantial evidence. In the jury's eyes, at least, he succeeded in proving these allegations. A critical component of his proof, indeed the most important component, was evidence showing that McGraw-Hill's stated reasons for discharging him were untruthful. His case thus fell squarely into the analytic structure erected by *Reeves*. Yet not a single word in the Tenth Circuit's decision is dedicated to rebutting or even addressing any of Manning's pretext evidence, a startling omission given that both the jury and the district court (which denied McGraw-Hill's Rule 50 motion) no doubt found this evidence to be compelling. In fact, the Tenth Circuit did not so much as mention *Reeves*.

In view of the panel's failure to consider *Reeves*, the appropriate remedy is a summary reconsideration order. An analysis of *Reeves* "might have led to a different result." *Board of Trustees v. Sweeney*, 439 U.S. 24, 26 (1978) (Stevens, J. dissenting). A reconsideration order is thus proper, for it is not at all certain "that the case [is] free from all obstacles to reversal on [the] intervening precedent." *Henry v. City of Rock Hill*, 376 U. S. 776, 777 (1964) (stating the standard by which to measure whether a summary reconsideration order is proper).

Granted, technically *Reeves* is not an intervening precedent, since it was decided one day before the panel released its decision. Nonetheless, it is plain that the court of appeals did not adequately address *Reeves*, and, further, that it did not have a meaningful opportunity to do so. Its denial of Manning's petition to reconsider in light of *Reeves* is just that: a decision refusing to consider *Reeves*. Manning seeks no more from this Court than an order directing the court of appeals to consider *Reeves*.

To let the Tenth Circuit's decision stand without mention of what is the controlling legal authority, authority issued *before* the panel's opinion, is to undermine the power

of this Court. It is also to visit a terrible injustice on Art Manning. This Court should grant the petition for certiorari, vacate the decision by the Tenth Circuit, and remand for reconsideration in light of *Reeves*.

II

The Tenth Circuit Committed the Same Errors as the Fifth Circuit in *Reeves*

In reversing the jury's verdict, said this Court in *Reeves*, the Fifth Circuit wrongly confined its review to evidence beyond that supporting the employee's prima facie case and his showing of pretext. The court of appeals restricted its view of evidence favorable to Reeves to two narrow categories: 1) evidence of certain derogatory, age-based comments directed at Reeves; and 2) evidence that the employer singled Reeves out for harsher treatment than younger employees. It also ignored evidence of pretext. *Reeves v. Sanderson Plumbing Products Inc.*, 120 S. Ct. at 2108.

It was apparent to the *Reeves* Court that the scope of this review reflected a fundamental misunderstanding about the evidentiary burden borne by the plaintiff:

> [T]he Court of Appeals proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendants' legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination.

Id. This assumption, said *Reeves*, was wrong. *Id.* And after Reeves, any court that similarly narrows its review of

the evidence and similarly disregards evidence of pretext is also wrong.

A. Panel Narrowly Confined Its Review of the Evidence and Ignored Evidence of Pretext

Here the Tenth Circuit committed the same errors as the Fifth Circuit in *Reeves*. First, it confined its review of evidence favorable to Manning. The panel examined only three forms of evidence favorable to Manning: three age-based comments, testimony and statistics showing that other employees in his department were discriminated against on the basis of age, and Manning's performance between his date of hire and the arrival of new management. (slip op. at 9 a –12 a.)

Second, and more important, the panel ignored evidence of pretext. As the panel noted, McGraw-Hill's stated reasons for terminating Manning were his poor performance, specific examples of which are discussed below, and his failure to reach certain sales goals, also discussed below. (slip op. at 12 a.) Manning presented evidence that directly undermined these reasons. None of it, however, was credited, addressed, or analyzed by the panel. It was simply not a part of the panel's decision, no doubt because the court assumed that such evidence was something less than proof of intentional discrimination, something less than required to sustain the jury's verdict. *Reeves* said this assumption was wrong.

Here, following, are just a few instances in which the panel seemingly adopted McGraw-Hill's performance-related criticism of Manning without mentioning, let alone crediting, his evidence of pretext:

1. Advertising Rates Offered to Toyota

One reason offered by McGraw-Hill for firing Manning was its charge that "he had negotiated an

advertising rate for Toyota that was significantly below regular station rates, without prior management approval." This quote, which comes directly from the panel's opinion (slip op. at p. 4 a), rests entirely on testimony by a McGraw-Hill witness.

At trial, Manning undermined the witness's testimony. Revealing that supervisors explicitly instructed him to get Toyota's business at any price, Manning told jurors that he did not need management approval to offer discounted rates. This testimony was uncontroverted. A McGraw-Hill manager admitted that he could not recall telling sales executives that they needed such prior approval. More important, no McGraw-Hill official objected to the rates at the time they were negotiated. Indeed it was not until after Manning filed his EEOC complaint that the company first called his action a "serious" offense (this charge was leveled in the company's response to Manning's EEOC complaint).

This evidence suggested that the rates offered to Toyota had little to do with Manning's termination. It was not considered by the panel, despite the directive from *Reeves*.

2. Scores on Job Evaluations

The panel similarly ignored evidence of pretext concerning another stated reason for Manning's discharge. McGraw-Hill claimed that Manning consistently scored low on job evaluations (after new management arrived), specifically his 1992 and first quarter 1993 job evaluations. According to the company, these low scores necessitated his termination. The panel embraced this justification, echoing McGraw-Hill's charge not only that Manning failed to reach the goals described in the evaluations but also that in one particular evaluation he received the lowest score of any sales executive. (slip op. at 5 a .)

But the panel's reliance on Manning's "scores" overlooked evidence—offered by Manning—exposing what in fact was an arbitrary and standardless scoring system. For instance, in the first quarter of 1992 evaluation, Manning received a score of "5.5" out of a possible 10 and hence, according to McGraw-Hill, only achieved "55%" of his goals. Yet the review had a total of 25 goals and its notes indicate that Manning achieved all but 8 of them. Thus, though he met over two thirds of the stated goals his performance was 55%. Similarly, in the third quarter of 1992, Manning achieved 13 out of 16 listed goals. Nonetheless, instead of receiving a score of over 80%, McGraw-Hill gave him a score of "6," which the company insisted meant he only achieved "60%" of his goals. McGraw-Hill offered no explanation as to how it arrived at these scores. For his part, Manning stated that he did not understand the scoring system and that he did not believe it was fair. Again, there is no mention of this evidence in the panel's decision.

3. Removal of Sales Accounts

Still another example of the panel's refusal to consider pretext evidence lies in its facile acceptance of McGraw-Hill's claim that certain sales accounts performed poorly under Manning's direction. Indeed, the panel stated that the company removed these accounts from Manning in part *because* of their underperformance (slip op. at 5 a.) Manning discredited this claim. First, he countered defense testimony that his three largest accounts were taken from him in 1991 due to their poor performance with evidence showing that just weeks after their removal, McGraw-Hill lauded his handling of these accounts. In a performance evaluation soon after the removal of the accounts, the company stated that Manning had "fully met expectations" and was "maximiz[ing] KMGH's share of business" on his accounts. It also stated that he had achieved acceptable shares on his accounts and met his budget goals for that year.

Second, McGraw-Hill managers gave conflicting reasons for removing the accounts from Manning. One manager disavowed any performance-related reason explaining the removal of the accounts, claiming it was a measure taken for other unspecified reasons. Another said he took the accounts away from Manning in order to "free up" Manning's time to develop other business.

And finally, Manning presented evidence showing that McGraw-Hill inaccurately reported the performance of the accounts. A company official submitted misleading statistics to the EEOC in response to Manning's charge of discrimination, insisting that certain accounts "dramatically" improved in 1992 after they were reassigned from Manning to another sales executive. But the statistics failed to properly "credit" Manning for a large increase in revenues attributable to the accounts during the first quarter of 1992, or to note that it was under Manning's direction that these accounts posted their most significant increases for the year. One McGraw-Hill official admitted that this was an unfair reflection of Manning's contributions to the accounts.

Despite this evidence of pretext, a reader of the panel's decision would have no reason to question McGraw-Hill's claim that Manning mishandled certain of his accounts.

B. The Panel Disregarded Reeves's Mandate Concerning Rule 50 Motions

Rule 50 of the Federal Rules of Civil Procedure allows a court to set aside a jury's verdict and render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient basis for a reasonable jury to find for that party on that issue." Fed. Rule Civ. Proc. 50(a). As *Reeves* observed, this standard has caused much confusion in the courts of appeals, which have articulated differing formulations as to the scope of their review of a Rule 50 motion. Before *Reeves*, some circuits

limited their review to evidence favorable to the non-moving party, while others extended their review to the entire record, drawing all inferences in favor of the non-movant. *Reeves v. Sanderson Plumbing Products Inc.*, 120 S. Ct. at 2110.

Reeves ended the confusion. Although a court should review the entire record, said the *Reeves* Court, "it must *disregard* all evidence favorable to the moving party that the jury is not required to believe." *Id.* (emphasis added). In other words, if the non-moving party contradicts or impeaches certain evidence, a reviewing court cannot give that evidence credence. As *Reeves* put it: "[T]he court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.* (internal citations and quotations omitted).

Under this standard, the Tenth Circuit gave improper weight to evidence offered by McGraw-Hill and contradicted by Manning. For instance, one of the reasons the panel gave for discounting certain derogatory remarks about Manning's age was that these comments were made by a non-decisionmaker, Local Sales Manager James Sieke. According to the panel, "[General Sales Manager Chris] Westerkamp and [Station Manager John] Profitt, not Sieke, were the decision-makers in employment decisions at KMGH." But this claim was directly contradicted by evidence—presented by Manning—showing that Sieke was Manning's direct supervisor; that Sieke conducted Manning's performance evaluations, and, most important, that it was Sieke was actually fired Manning. In fact, because the evidence convincingly showed that he participated in every adverse employment decision taken against Manning, McGraw-Hill never argued at trial or on appeal that Sieke was other than a decision-maker.

There are still other examples in which the panel wrongly credited McGraw-Hill's version of disputed facts, in

violation of the rule announced by *Reeves*. Several have been mentioned above, e.g. the panel's adoption of McGraw-Hill's stated reasons for removing certain large sales accounts from Manning and its acceptance of the company's belated criticism of Manning for allegedly offering unauthorized advertising rates to Toyota. A final example lies in the panel's rejection of Manning's claim that other company employees were discriminated against due to their age.

Nines sales executives were hired between 1990 and 1995—all but one were under the age of 40. Four account executives left the sales department after 1991 (when new management arrived); all were over the age of 40. Two of them testified at trial and told the jury that age played a motivating role in their departure. McGraw-Hill denied these claims. The company said that one of those employees, Leonard Marsh, was let go under a Reduction in Force. But this testimony was starkly impeached when a McGraw-Hill official was forced to admit that a new, younger employee was hired after Marsh's departure and was assigned the same job responsibilities. Nevertheless, the panel reported only McGraw-Hill's version of Marsh's departure, stating that "Marsh was discharged because of a reduction in force . . ." (slip op. at 6 a.)

The panel similarly credited McGraw-Hill's explanation for Larry Grall's departure (he was the other over-40 witness). Like Marsh, Grall also testified that he was fired because of his age. The panel all but endorsed McGraw-Hill's position, finding that Grall was discharged due to a "change in job requirements." (slip op. at 6 a.) But again the panel did not acknowledge the severe blow this claim suffered when Manning presented evidence showing that the position's responsibilities had not changed after Grall left. In fact, Manning's successful impeachment effort compelled a change in McGraw-Hill's position. After the impeachment, a company official stated that Grall was fired

because management wanted someone different in his position.

In finding that Marsh and Grall were "discharged for non-age related reasons," the panel even stated that "Manning presented no other evidence of age discrimination in the termination of those employees." (slip op. at 10 a.) This startling claim, apart from its gross inaccuracy, is flatly at odds with *Reeves's* requirement that lower courts reviewing a Rule 50 motion must "disregard all evidence favorable to the moving party that the jury is not required to believe." Whatever else one might think about the reasons for Marsh and Grall's discharge, one can't deny that Manning presented evidence contradicting the explanations put forward by McGraw-Hill. That is, the jury was not required to believe McGraw-Hill's non-discriminatory reasons for firing Marsh and Grall. This does mean of course that the jury was obliged to believe Manning's evidence of pretext. What it does mean, however, is that the panel should have disregarded the company's reasons when it reviewed the denial of McGraw-Hill' Rule 50 motion. It certainly should not, as it did, accept and endorse McGraw-Hill's reasons.

III

The Exceptions Outlined by *Reeves* Do Not Apply Here

The *Reeves* Court made clear that under only the most unique circumstances should a jury's verdict in favor of an employee be overturned, provided the employee has established a prima facie case of discrimination and has introduced sufficient evidence of pretext. The Court could cite only two such circumstances: (1) where the record "conclusively" shows another, nondiscriminatory reason for the employer's decision; or (2) if the plaintiff's evidence of pretext is weak and there was "abundant and uncontroverted independent evidence" that discrimination did not occur.

Reeves v. Sanderson Plumbing Products Inc., 120 S. Ct. at 2109.

Neither exception applies here. McGraw-Hill has never claimed any reason apart from Manning's alleged poor performance to explain its decision to terminate him and certainly the record does not "conclusively" reveal any alternate reason. And second, even if Manning's evidence of pretext were weak, it can hardly be said that there is uncontroverted evidence (let alone abundant evidence) that discrimination did not occur. Indeed, if this petition for certiorari has shown anything, it has shown that nary an issue in the intensely disputed trial below went uncontroverted.

CONCLUSION

The decision by the Tenth Circuit panel is inconsistent with *Reeves*. Like the Fifth Circuit in *Reeves*, the panel here narrowly confined its review of the evidence; it disregarded evidence of pretext; and it wrongly credited evidence favorable to the employer despite that the evidence was contradicted or impeached by the employee. Unlike the Fifth Circuit, the panel here had the benefit of this Court's decision in *Reeves* and yet it failed to mention, let alone discuss, *Reeves*.

Manning's petition for writ of certiorari should be granted, the decision by the court of appeals should be vacated, and this matter should be remanded for reconsideration in view of *Reeves*.

/s/ _____
David A. Lane (Counsel of Record)
Paula Greisen
John T. Carlson
730 17th Street, Suite 600, Denver, CO 80202
(303) 534-6400
Attorneys for Petitioner

APPENDIX A

(Any footnotes trail end of document)

ART MANNING, Plaintiff-Appellee, v. McGRAW-HILL, INC.,

Defendant-Appellant. ART MANNING, Plaintiff-Appellant, v. McGRAW-HILL, INC., Defendant-Appellee.

No. 99-1010, No. 99-1130, No. 99-1029

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

216 F.3d 1087; 2000 U.S. App. LEXIS 13934; 2000 Colo. J. C.A.R. 3515

June 13, 2000, Filed

NOTICE: [*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: (D. Colo.). (D.C. No. 94-WM-1697).

DISPOSITION: District court's denial of McGraw-Hill's Rule 50 motion REVERSED and REMANDED; the district court's award of attorney fees REVERSED; the cross-appeal DISMISSED as moot.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed the United States District Court's (Colorado) denial of its Fed.

R. Civ. P. 50 motion for judgment as a matter of law after a jury found it willfully discriminated against plaintiff on the basis of age, in violation of the Age Discrimination in Employment Act, <=1> 29 U.S.C.S. @ 621 et seq. Plaintiff cross-appealed the refusal to award him front pay.

OVERVIEW: Defendant appealed the denial of its motion for judgment as a matter of law after a jury found that it willfully discriminated against plaintiff on the basis of age, in violation of the Age Discrimination in Employment Act, <=2> 29 U.S.C.S. @ 621 et seq. The court reversed holding that the statements defendant made regarding age, which were denied, were insufficient to establish plaintiff was discharged because of his age. Plaintiff did not prove any nexus between defendant's statements and defendant's decision to fire him. Also, defendant stated reasons for termination, including plaintiff's poor performance and failure to meet his quarterly goals for over a year. The court would not second-guess business decisions made by employers, in the absence of some evidence of impermissible motives.

OUTCOME: The district court's denial of defendant's Fed. R. Civ. P. 50 motion was reversed and remanded because defendant's remarks of age were not sufficient to establish age discrimination, and there was no nexus between the statements and the decision to fire plaintiff. The district court's award of attorney fees was reversed, and the cross-appeal was dismissed as moot.

CORE TERMS: age discrimination, discharged, matter of law, first quarter, score, poor performance, basis of age, discriminated, termination, station, memo, Employment Act, damage award, age-related, cross-appeal, willfully, front, moot, failed to meet, sales manager, advertising, salespeople, negotiated, quarterly, good old, terminating, pretextual, remittitur, quotations, pretext

CORE CONCEPTS - <=31> show concepts

COUNSEL: For ART MANNING, Plaintiff - Appellee (99-1010): Paula D. Greisen, Denver, CO. John T. Carlson, Miller, Lane, Killmer & Greisen, Denver, CO.

For MCGRAW-HILL, INC., Defendant - Appellant (99-1010): Franklin A. Nachman, Karen Ellen Ford, Littler & Mendelson, Denver, CO.

For ART MANNING, Plaintiff - Appellee (99-1130): David A. Lane, Denver, CO. Paula Dee Greisen, Miller, Lane & Killmer, Denver, CO. John T. Carlson, Miller, Lane, Killmer & Greisen, Denver, CO.

For MCGRAW-HILL, INC., Defendant - Appellant (99-1130): Franklin A. Nachman, George F. Cicotte, Karen Ellen Ford, Littler & Mendelson, Denver, CO.

For ART MANNING, Plaintiff - Appellant (99-1029): Paula D. Greisen, Denver, CO. John T. Carlson, Miller, Lane, Killmer & Greisen, Denver, CO.

For MCGRAW-HILL, INC., Defendant - Appellee[*2] (99-1029): Franklin A. Nachman, Karen Ellen Ford, Littler & Mendelson, Denver, CO.

JUDGES: Before BALDOCK, KELLY, and BRISCOE, Circuit Judges.

OPINION BY: Mary Beck Briscoe

OPINION: ORDER AND JUDGMENT *

McGraw-Hill, Inc., appeals the district court's denial of its Federal Rule of Civil Procedure 50 motion for judgment as a matter of law after a jury found it willfully discriminated against Art Manning on the basis of age, in

violation of the Age Discrimination in Employment Act. <=8> 29 U.S.C. @ 621 et seq. McGraw-Hill also appeals the damages award and the award of Manning's attorney fees. Manning cross-appeals the district court's refusal to award him front pay. We exercise jurisdiction pursuant[*3] to <=9> 28 U.S.C. @ 1291, reverse the district court's denial of McGraw-Hill's Rule 50 motion, and dismiss the cross-appeal as moot.

I.

Art Manning was a sales account executive at television station KMGH-Channel 7 in Denver, Colorado, which was owned by McGraw-Hill, Inc. Manning's job was to sell advertising on KMGH and to service existing advertising accounts. Manning worked for KMGH from 1979 until 1993. In January 1991, John Proffitt became general manager of KMGH. In February 1992, James Sieke became the local sales manager of KMGH, making him Manning's supervisor. Sieke reported to Chris Westerkamp, who became general sales manager of KMGH in June 1991.

Manning serviced the station's large advertising accounts with Toyota, Lexus, and Coca-Cola. Starting in 1992, Sieke and Westerkamp became concerned about Manning's performance, and particularly about the station's share of business from Toyota, Lexus, and Coca-Cola. Sieke testified that because KMGH's ratings were low it was very important for KMGH to have better salespeople than its competition. In March 1992, Sieke discovered that Manning had negotiated a second quarter 1992 advertising rate for Toyota[*4] that was significantly below regular station rates, without prior management approval. Sieke and Westerkamp decided to take the Toyota, Lexus, and Coca-Cola accounts from Manning. Sieke testified he took the Toyota account from Manning because of the unapproved rate and because of Manning's overall

performance in 1991, and he took the Coca-Cola account because of Manning's underperformance on the account. Megan Back, who took over the Toyota account, negotiated a 22% share of Toyota's television advertising for the third quarter in 1992 when Manning had negotiated a 4% share for the same time period the previous year. In October 1992, the station share of Toyota increased to 24%, compared to Manning's 7% for October 1991.

Sales executives at KMGH set quarterly goals for themselves. Sieke testified that Manning did not achieve some of his fairly simple first quarter 1992 goals. Westerkamp gave Manning a performance score of 5.5 out of 10, which was below average for sales executives. Manning also failed to meet his second quarter 1992 goals, receiving a performance score of 4, the lowest of any sales executive. Sieke testified that Manning did not appear to be concerned about his low[*5] performance scores. On July 15, 1992, Westerkamp addressed a memo to Manning setting out the steps necessary for Manning to improve his performance and stating if Manning's performance did not improve significantly he could be discharged. Manning received a performance score of 6 for his third quarter 1992 goals, still the lowest of any sales executive. He also did not meet his fourth quarter 1992 goals, receiving a performance score of 4. Manning did not object to any of these scores when they were given or claim they were the result of age discrimination.

On December 29, 1992, Westerkamp issued a letter of final warning to Manning. The letter included goals for Manning to complete in the first quarter of 1993 and advised Manning that failure to meet the goals would result in his termination. Manning filed a written response alleging Westerkamp was discriminating against him on the basis of his age and requesting a meeting to revise the goal expectations. On December 31, 1992, Manning filed a charge of age discrimination with the E.E.O.C. On January

5 and January 11, 1993, Westerkamp and Sieke met with Manning to discuss and revise his first quarter 1993 goals. On January 19, 1993, Westerkamp[*6] sent Manning a memo detailing why Manning's presentation writing skills were inadequate. On January 25, 1993, Sieke sent Manning a four-page memo outlining his progress on his first quarter 1993 goals. In February 1993, Manning filed a charge of retaliation with the E.E.O.C. On March 11, 1993, Sieke sent Manning a follow-up memo addressing Manning's progress on his first quarter 1993 goals.

Manning did not meet his first quarter 1993 goals. On March 31, 1993, Westerkamp discharged Manning. Manning was 49 years old at the time. Westerkamp denied that age was a factor in Manning's termination, stating that he had no reason to fire someone because of his age if he was a good salesperson. Manning testified that during his quarterly goal reviews Sieke made comments about his age. Manning claimed Sieke said he "was just about ten years behind the times," that "we don't do things the good-old-boy way anymore," and that he had "a whole room of young, aggressive salespeople out there." Aplt. App. I at 278. Sieke denied making any of these statements.

Manning claimed that KMGH discriminated against other employees on the basis of age. Lawrence Grall worked at KMGH for ten years, eight years[*7] as a sales executive and two years as local sales manager. He believed he was discharged because Proffitt and Westerkamp were bringing in a younger group of managers. Proffitt testified that Grall was discharged because of a change in job requirements and his lack of performance. Leonard Marsh worked at KMGH from 1978 to 1992. Marsh was discharged because of a reduction in force, but he believed it was because of his age. Of the nine sales executives hired from 1990-1995, all except one were under the age of 40. Of the four individuals who left the sales department since 1991, all were over the age of

40. These individuals were Manning, Grall, Marsh, and Peter Remmert. Sieke testified that other sales executives over the age of 40 worked at KMGH while Manning was there and KMGH had hired employees over the age of 40 since Manning left. Tausca Schillaci and William Goddard, sales executives at KMGH, were over the age of 40 and both testified they did not believe they were subjected to age discrimination.

On June 28, 1994, Manning filed a complaint in Colorado state court alleging McGraw-Hill violated the Age Discrimination in Employment Act (ADEA) and the Colorado Anti-Discrimination[*8] Statute. n1 McGraw-Hill removed the action to federal court under <=10> 28 U.S.C. @ 1446. On May 5, 1997, a jury found that McGraw-Hill willfully discriminated against Manning on the basis of age and awarded him back pay of $ 324,900. The jury concluded that McGraw-Hill did not prove Manning failed to mitigate his damages. The jury further concluded that McGraw-Hill did not retaliate against Manning for filing charges of discrimination with the E.E.O.C. On May 8, 1998, the district court determined that Manning was entitled to liquidated damages in an amount equal to the award of back pay, but that Manning was not entitled to prejudgment interest or front pay.

On December 8, 1998, the district court denied McGraw-Hill's renewed Rule 50 motion for judgment[*9] as a matter of law, rejecting its arguments on liability, willfulness, and attorney fees. The court granted the motion on damages, requiring Manning to elect between a remittitur reducing the damage award against McGraw-Hill or a new trial on the issue of damages. Manning accepted the remittitur, reducing his damage award to $ 401,000. The district court determined that Manning was entitled to attorney fees as the prevailing party, pursuant to <=11> 29 U.S.C. @ 216(b), and awarded fees at the rate of $ 175 per hour, for a total of $ 166,215.43.

II.

The district court denied McGraw-Hill's Rule 50 motion for judgment as a matter of law. We review the district court's denial of a motion for judgment as a matter of law de novo, applying the same legal standard as the district court. <=12> Deters v. Equifax Credit Info. Servs., Inc., 202 F.3d 1262, 1268 (10th Cir. 2000) (citing <=13> Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1241 (10th Cir.1999)). A party is entitled to judgment as a matter of law only if the "evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." Id. (internal[*10] quotations omitted). In reviewing the record, we "will not weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury." Id. Judgment as a matter of law is appropriate only if there is no legally sufficient evidentiary basis for a claim under the controlling law. Id. We consider the evidence, and any inferences drawn therefrom, in favor of the non-moving party. Id.

Under the Age Discrimination in Employment Act (ADEA), it is unlawful for an employer "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." <=14> 29 U.S.C. @ 623(a)(1). A plaintiff may prove his ADEA claim through the burden-shifting framework of <=15> McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). See <=16> Jones v. Unisys Corp., 54 F.3d 624, 630 (10th Cir. 1995). Under the McDonnell Douglas analysis, the plaintiff has the initial burden of establishing a prima facie case of age discrimination. The burden shifts to the defendant to articulate some[*11] legitimate, nondiscriminatory reason for the challenged action, then shifts back to the plaintiff to prove the defendant's stated

reason was a pretext for unlawful discrimination. <=17> Jones v. Denver Post Corp., 203 F.3d 748, 752-53 (10th Cir. 2000) (citing <=18> McDonnell Douglas, 411 U.S. at 802-04).

However, after "a full trial on the merits, the sequential analytical model adopted from McDonnell Douglas . . . drops out" and this court is "left with the single overarching issue whether plaintiff adduced sufficient evidence to warrant a jury's determination that adverse employment action was taken against him on the basis of age." <=19> Doan v. Seagate Tech., Inc., 82 F.3d 974, 977 (10th Cir. 1996). There is no dispute that adverse employment action was taken against Manning. The issue is whether there was sufficient evidence to support the jury's finding that Manning was discharged because of his age.

A plaintiff bringing a claim under the ADEA must establish that his age was a "determining factor" in the employer's decision. <=20> Greene v. Safeway Stores, Inc., 98 F.3d 554, 557 (10th Cir. 1996) (citing <=21> Lucas v. Dover Corp., 857 F.2d 1397, 1400 (10th Cir. 1988)).[*12] "The plaintiff need not prove that age was the sole reason for the employer's acts, but must show that age made the difference in the employer's decision." Id. (internal quotations omitted).

Manning contends three statements by Sieke evidenced age discrimination: (1) that Manning "was just about ten years behind the times," (2) that "we don't do things the good-old-boy way anymore," and (3) that "I've got a whole room of young, aggressive salespeople out there." Aplt. App. I at 278. Even if we accept that these statements were made, which Sieke denied, we conclude they are insufficient to establish Manning was discharged because of his age. "Age-related comments referring directly to the plaintiff can support an inference of age discrimination,

but 'isolated [or] ambiguous comments' may be . . . too abstract to support such an inference." <=22> Stone v. Autoliv ASP, Inc, 210 F.3d 1132, 1140 (10th Cir. 2000) (quoting <=23> Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 531 (10th Cir. 1994)). "A plaintiff must demonstrate a nexus exists between the allegedly discriminatory statement and the company's termination decision . . . and therefore 'that age[*13] actually played a role in the defendant's decisionmaking process and had a determinative influence on the outcome.'" Id. (quoting <=24> Rea v. Martin Marietta Corp., 29 F.3d 1450, 1455 (10th Cir. 1994)). Manning did not prove any nexus between Sieke's statements and McGraw-Hill's decision to fire him. See <=25> Lindsey v. Baxter Healthcare Corp., 962 F.2d 586, 588 (7th Cir. 1992) (stating that "no weight can be attached to . . . 'good old boys,' [because] any competent user of the English (or rather the American) language knows that to be a good old boy one need not be old, or for that matter good"). Further, age-related comments "by non-decisionmakers are not material in showing the [defendant's] action was based on age discrimination." <=26> Cone, 14 F.3d at 531. Westerkamp and Proffitt, not Sieke, were the decision-makers in employment decisions at KMGH.

Manning also alleged that other employees over the age of 40 were discharged because of their age and he presented the testimony of Grall and Marsh. McGraw-Hill representatives stated that Grall and Marsh were discharged for non-age related reasons and Manning presented no other evidence[*14] of age discrimination in the termination of those employees. Further, at least two sales executives over the age of 40 were still employed at KMGH at the time of trial, negating Manning's theory of widespread, age-related firings at the station. The evidence presented by Manning did not establish a pattern of age discrimination at KMGH. See <=27> Vanasco v. National-Louis Univ., 137 F.3d 962, 967 (7th Cir. 1998)

(stating that "evidence of scattered decisions either favoring or disfavoring older employees reveals little about the University's processes and is certainly insufficient, without more, to prove a pattern of age discrimination").

Manning relies on his past evaluations of acceptable performance and letters of commendation from 1989 to establish that his discharge for poor performance was pretextual. In 1989, Manning received an evaluation of "performance substantially and consistently exceeded expectations and was clearly exceptional." Aplt. App. II at 482. "Pretext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations." <=28> Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 528 (3d Cir. 1992).[*15] For 1990, Manning's evaluation stated that his "performance was below expectations." Aplt. App. II at 488. This was before Proffitt, Westerkamp, or Sieke became Manning's supervisors and superiors. Manning failed to meet his self-determined goals and received poor performance reviews for all four quarters of 1992 and the first quarter of 1993. He received numerous warnings regarding his poor performance and detailed suggestions of how to improve his performance, but his performance did not improve. Although Albert Knittle, Thomas McCarthy, and Mary Beth Lynch-McGrath, clients of Manning's, testified that Manning was one of their best sales representatives, this does not contradict McGraw-Hill's belief that Manning failed to meet expectations.

McGraw-Hill's stated reasons for terminating Manning's employment were poor performance and failure to meet his quarterly goals for over a year. "This court will not second guess business decisions made by employers, in the absence of some evidence of impermissible motives." <=29> Lucas, 857 F.2d at 1403-04. Manning did not

dispute the accuracy of his performance reviews when they were given. See <=30> Gairola v. Virginia Dep't of Gen. Servs., 753 F.2d 1281, 1287 (4th Cir. 1985)[*16] (stating that Title VII and @@ 1981 and 1983 do not "require an employer to adopt a life of economic altruism and thereby immunize protected class members from discharge or demotion despite their poor performance and inadequate qualifications"). Manning failed to show that age was a determining factor in the decision to fire him or that McGraw-Hill's stated reasons for terminating his employment were pretextual. We conclude that the district court erred in denying McGraw-Hill's Rule 50 motion for judgment as a matter of law. n2

III.

The district court's denial of McGraw-Hill's Rule[*17] 50 motion is REVERSED and the case is REMANDED for entry of judgment as a matter of law for McGraw-Hill on Manning's age discrimination claims. The district court's award of attorney fees to Manning is REVERSED. The cross-appeal is DISMISSED as moot.

Entered for the Court

Mary Beck Briscoe

Circuit Judge

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

n1 Manning also alleged breach of contract, promissory estoppel, and intentional infliction of emotional

distress/outrageous conduct. He does not appeal the district court's grant of McGraw-Hill's motion for summary judgment on these claims.

n2 Because we conclude there was insufficient evidence to support the jury verdict finding McGraw-Hill discriminated against Manning on the basis of age, the issues of whether McGraw-Hill acted willfully, whether the damage award was excessive, whether Manning mitigated his damages, whether the district court's award of attorney fees to Manning was proper, and whether the district court erred in denying Manning front pay are moot.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 94-WM-1697

ART MANNING,

Plaintiff,

V.

McGRAW-HILL, INC.,
Defendant.

FILED
UNITED STATES
DISTRICT COURT
DENVER, COLORADO

Dec 30 1998
JAMES R.
MANSPEAKER
CLERK
BY _____

AMENDED JUDGMENT

Pursuant to and in accordance with the Order entered by Judge Walker D. Miller, of December 30, 1998, which is incorporated herein by reference as if fully set forth, and in accordance with orders filed during the pendency of this case, it is ordered that

1. Judgment is entered in favor of the plaintiff Art Manning and against the defendant McGraw-Hill in the amount of $401,000.00.

2. Plaintiff may have his costs in accordance with the Court's separate orders.

DATED at Denver Colorado, this 30th day of December, 1998.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

By: /s/ Charlotte Hoard
Deputy Clerk

ENTERED
ON THE DOCKET

DEC 30 1998

JAMES R. MANSPEAKER
CLERK

APPENDIX C

(Any footnotes trail end of document)

ART MANNING, Plaintiff, v. McGRAW-HILL, INC., Defendant.

Civil Case No. 94-WM-1697

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

64 F. Supp. 2d 996; 1998 U.S. Dist. LEXIS 22368

December 8, 1998, Decided
December 8, 1998, Filed

DISPOSITION: [**1] Defendant's motion to reverse verdict on liability or order new trial denied. Defendant's motion to reverse verdict on willfulness or order new trial denied. Defendant's motion for new trial or for remittitur granted.

CORE TERMS: mitigation, new trial, earnings, remittitur, reasonableness, coffee, mitigate, willfulness, good-faith, comparable, farming, farm, self-employment, willful, estimate, unsuccessful, ongoing, matter of law, jury verdict, calculation, maximum, age discrimination, reasonable effort, duty to mitigate, burden of proof, credibility, favorable, tendered, fringe benefits, annual earnings

COUNSEL: For Plaintiff: David Lane, Paula Greisen, Miller Lane Kilmer and Greisen, Denver, CO.

For Defendant: Karen E. Ford, Franklin A. Nachman, George F. Cicotte, Litler Mendelson, Denver, Colorado.

JUDGES: Walker D. Miller, Judge, United States District Court.

OPINION BY: Walker D. Miller

OPINION: [*997] ORDER ON DEFENDANT'S MOTION PURSUANT TO RULES 50 AND 59, FED.R.CIV.P.

Miller, J.

Before me is defendant's Renewed Motion for Judgment as a Matter of Law and Alternative Request for a New Trial or to Alter or Amend the Judgment, n1 which requests that I:

1. Reverse the jury verdict on liability or order a new trial on that issue;

2. Reverse the jury verdict on willfulness or order a new trial on that
issue;

3. Reduce the jury verdict on damages or order a new trial on that issue; and

4. Reduce the award of attorney fees.

Following review of the parties' motions, responses, replies and the record, I rule as follows:

1. Liability

The jury made its liability decision on the basis of the evidence presented. Viewing that evidence in the light most favorable to the plaintiff, <=1> Kline v. Grynberg, 44 F.3d 1497 (10th Cir. 1995), there is evidence which directly, or by reasonable inference, would allow a jury to reach its verdict that age was a determining factor in

plaintiff's discharge. Accordingly, defendant's Rule 50 motion for judgment as a matter of law should be denied. <=2> Weese v. Schukman, 98 F.3d 542, 546 (10th Cir. 1996); <=3> Kline v. Grynberg, supra.

A new trial should be granted if the verdict is against the clear weight of the [*998] evidence. Moore's Federal Practice, Section 59.13. Viewing the evidence as a whole and considering the credibility determinations made by the jury, I cannot conclude that the jury's verdict on liability is "clearly, decidedly, or overwhelmingly" against the weight of the evidence as required by this Circuit to order a new trial. <=4> Richardson v. City of Albuquerque, 857 F.2d 727, 730 (10th Cir 1988). Accordingly, [**3] the motion for new trial on liability should be denied.

2. Willfulness

The same evidence that allowed the jury to conclude age discrimination may permit the inference that the defendant's violation of the ADEA was "willful" because the defendant either knew or showed reckless disregard of whether its conduct was prohibited by the ADEA in accordance with the standards established by <=5> Hazen Paper Co. v. Biggins, 507 U.S. 604, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993). Again, the jury's decision on this matter must be given deference, even if I would have decided otherwise. Defendant focuses solely on the evidence it believes favorable to it or on possible inferences which assist its reconstruction of the evidence, essentially reversing the applicable standard of viewing the evidence in the light most favorable to the non-moving party.

Defendant even makes the wholly unsubstantiated claim that plaintiff has a "higher burden of proof" or a "higher standard of proof" which must be met to prove willful discrimination. Defendant's Reply Brief, page 22. Not

surprisingly, defendant provides no citation for such a misstatement of law. All matters in ADEA claims need only[**4] be proved by a preponderance of the evidence. <=6> Tennes v. Commonwealth of Massachusetts, Dep't of Revenue, 944 F.2d 372, 378 (7th Cir. 1991).

Defendant's unsupportable assertion is at best but another attempt to make proof of "willfulness" more difficult than Congress intended, an exercise explicitly rejected by Hazen, which held that an ADEA plaintiff does not have to prove the employer's conduct outrageous, provide direct evidence of improper motivation, or prove that age was the predominant factor. <=7> 507 U.S. at 617. It is not necessary that there be some additional or direct evidence of willfulness. Once the evidence is sufficient to show age discrimination, a jury may also conclude from facts such as those present here (knowledge of the ADEA, disputed performance ratings, ageist comments) that the discrimination was willful under the Hazen standard. See <=8> Starceski v. Westinghouse Electric Corp., 54 F.3d 1089, 1098 (3d Cir. 1995); <=9> Molnar v. Otis Elevator, 37 F.3d 335 (7th Cir. 1994).

Again, I cannot conclude that the jury's verdict was "clearly, decidedly, or overwhelmingly" against the weight of evidence. <=10> Richardson, 857 F.2d at 730.[**5]

Defendant also complains that its inclusion of a good-faith defense in its tendered "willful" instruction should have been given. The proposed instruction states, in relevant part, that if "the employer reasonably and in good faith believed that its action was permitted by the ADEA, the employer did not act 'willfully.'" Defendant's tendered Instruction No. 13. The defendant cited Hazen as authority, but Hazen prescribed a standard applicable to different circumstances than those presented here: "If an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based

decision, then liquidated damages should not be imposed." <=11> 507 U.S. at 616. Here, defendant never claimed that it made a good-faith "age-based decision," making its proposed instruction inapposite.

Regardless, the actual jury instructions given adequately covered a good-faith defense by recognizing that it was "defendant's good-faith perception of plaintiff's performance that is relevant" (Jury Instruction No. 22); that defendant had "the right to make subjective business judgments and assessments concerning plaintiff's performance, so long as plaintiff's[**6] age [*999] is not a determining factor" (Jury Instruction No. 23); and that the "ADEA is not intended to allow a jury to second guess the employer's legitimate business decisions" (Jury Instruction No. 24).

Accordingly, defendant's motion to set aside the willfulness finding as a matter of law or to grant a new trial on that issue should be denied.

3. Damages

Defendant seeks reversal of the jury's verdict on damages. Alternatively, it requests either a new trial outright or a new trial if plaintiff does not accept a remittitur or reduction of damages. n2

Defendant first argues, relying upon <=14> Greenway v. Buffalo Hilton Hotel, 143 F.3d 47 (2d Cir. 1998), that, since plaintiff[**7] did not seek comparable work as a sales representative or prove that such work was unavailable, the jury verdict should be reversed. Regardless of whether the Greenway case stands for such a limited proposition, defendant in essence advocates a per se rule which would rule out a job change as a reasonable effort to mitigate. I decline to create such a rule and agree with other courts that efforts at a new career, which are

reasonable and in good faith under the circumstances, are acceptable alternatives to finding employment similar to that lost. <=15> Smith v. Great American Restaurants, Inc., 969 F.2d 430, 438 (7th Cir. 1992) ("the notion that starting one's own business cannot constitute comparable employment for mitigation purposes not only lacks support in the cases, but has a distinctly un-American ring"); <=16> Carden v. Westinghouse Electric Corp., 850 F.2d 996 at 1005, 1006 (3d Cir. 1988); <=17> Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061, 1065 (8th Cir. 1988).

Efforts at self-employment do "not require success, but only an honest, good-faith effort." <=18> Smith v. Great American Restaurants, Inc., 969 F.2d at 438.[**8]

Certainly, plaintiff had the duty to make reasonable efforts to mitigate his losses. He could not simply refuse to seek comparable employment or other opportunities. <=19> EEOC v. Sandia Corp., 639 F.2d 600, 627 (10th Cir. 1980); <=20> Acrey v. American Cheap Industry Association, 981 F.2d 1569, 1576 (10th Cir. 1992). Nevertheless, the ultimate burden of proof of showing that plaintiff did not reasonably mitigate rests upon the defendant as employer. <=21> Acrey, 981 F.2d at 1576 (citing <=22> Spulak v. K Mart Corporation, 894 F.2d 1150, 1158 (10th Cir. 1990)).

Applying those principles to this case, the jury was instructed that the defendant had the burden of proof, by a preponderance of the evidence, to show plaintiff's failure to mitigate (see Jury Instruction No. 26) and was propounded the following interrogatory: "Do you believe that defendant proved that plaintiff failed to mitigate his damages?" The jury's answer was "no."

With regard to the amount of damages, the jury's verdict of $ 324,900 is the precise amount of back pay or past

economic loss estimated by plaintiff's expert, Dr. Jane Lillydahl, indicating the jury's judgment[**9] of her credibility.

Applying the same standards, I must decide whether there exists sufficient evidence to support the jury's verdict or whether those verdicts are clearly contrary to the weight of evidence.

Turning first to the mitigation issue in general, there is evidence from which a jury could reasonably conclude that plaintiff's decision to operate the coffee farm full time, at the time of his decision, n3 was a reasonable effort to mitigate, at least up to a point.

[*1000] Dr. Lillydahl was asked, without objection, n4 whether plaintiff acted reasonably in the mitigation[**10] of his damages, and she indicated that he had under the circumstances. Similarly, defendant's expert, Jory Laine, agreed that mitigation efforts on the coffee farm would be reasonable if plaintiff could have reasonably anticipated to replace his income from the coffee farm.

The uncontested measuring rod for the reasonableness of mitigation efforts was plaintiff's expert's opinion that plaintiff's annual earnings while employed by defendant were $ 71,400 plus fringe benefits of approximately twenty percent of that amount, or a total of $ 85,680 a year. [**11]

At the time plaintiff made the decision to attempt mitigation by coffee farming, he had owned the coffee farm for several years and had other experiences upon which to estimate his earnings. The record indicates that Dr. Lillydahl's conclusion of reasonableness was based upon the plaintiff's estimate that he would start out making $ 35,000 to $ 45,000 a year. n5 Likewise, Mr. Laine testified that, if it were reasonable to estimate the plaintiff

making $ 50,000 to $ 75,000 per annum within two or three years, coffee farming would be a reasonable effort at mitigation. It was also brought out that the cost of living in Venezuela was forty to eighty percent of that in the United States, meaning that a $ 40,000 income may approximate plaintiff's pre-termination earnings.

Defendant did not directly attack the reasonableness of those opinions or their factual bases, including[**12] plaintiff's earning's estimates. Defendant called no witness to challenge the estimated earnings on the coffee farm and did not cross examine plaintiff on the issue other than to reconfirm the earnings figures given by Dr. Lillydahl for the years subsequent to termination. Mr. Laine ultimately concluded that he did not feel coffee farming was reasonable mitigation, but he also conceded that he had made no investigation, leaving his opinion but a bald conclusion which the jury apparently gave little, if any, weight.

I therefore conclude that, based upon the evidence presented to the jury, it could have reasonably inferred that the plaintiff's coffee farming attempt was acceptable mitigation at the time of his decision. My inquiry does not end there, however, as it should measure those expectations of mitigation against the reality of actual performance.

If plaintiff's choice of self-employment proves unsuccessful, he cannot expect an ongoing subsidy from his former employer. "The ADEA must not be used as a tool for insuring a plaintiff's fledgling business while it continues to sustain losses." <=25> Smith v. Great American Restaurant, Inc., 969 F.2d at 439. Indeed, [**13] the duty to mitigate is ongoing. If plaintiff's self-employment proves unsuccessful, he should resume search for other comparable employment. <=26> Hansard v.

Pepsi Cola Metropolitan Bottling Co., Inc., 865 F.2d 1461, 1468 (5th Cir. 1989).

Here the evidence of the performance of the plaintiff's farming business is essentially uncontested, but nevertheless, as a basis for decision making, it is barely adequate. The only evidence of the farm's earnings was some general testimony of the plaintiff on cross-examination that he had a net income of $ 15,000 in 1994, a net loss of [*1001] $ 1,500 in 1995 and a $ 2,000 net income in 1996. He expected to make $ 10,000 in 1997, although it was early in the year. Thus the farm income for four years, assuming plaintiff's 1997 estimate was correct, was $ 25,500. These numbers, which were not challenged by defendant, were adopted by Dr. Lillydahl in her opinion as an offset against her calculation of 4.09 years of income at $ 71,400 (prior to adding twenty percent for fringe benefits to the net loss figure). The 4.09 years reflect the fact that approximately four years and one month had elapsed between termination (March 31, 1993) and trial (May 1, 1997). [**14]

These figures are somewhat inconsistent as the expert adds a month of lost income without a corresponding offset for a month of mitigation earnings. They also ignore the 1993 earnings, n6 the first year of operation, and add an estimated income for the incomplete year of 1997. Defendant, however, did not challenge the accuracy of these numbers or assume its burden to show that plaintiff failed to mitigate. Defendant could have pursued many questions to avoid or minimize a potential windfall to plaintiff. As distinguished from salary comparisons, self-employment raises many issues which should be pursued to avoid undue benefit:

For example: Has the plaintiff drawn a salary which has reduced, if not eliminated the year-end profit? Have personal expenses, normally paid by a wage earner from a

salary been absorbed by the business, e.g. personal car expenses, insurance, vacations and other personal expenses? Have dividends been paid? Have profits been earned? Have particular expenses been appropriately offset against revenues? Have profits been reinvested in capital assets and have reserves been established? If so, how should they be treated in mitigation context. Has the plaintiff[**15] benefited by an increase in value of the business? <=27> Carden v. Westinghouse Electric Corporation, 850 F.2d at 1005-1006 (doctrine of mitigation is to prevent a windfall or double recovery).

Further questions arise in the agricultural industry because an owner has the ability to avoid or defer profit recognition by various means, including deferring sales, incurring expenses at strategic times or capitalizing actual production.

These are all legitimate issues to determine whether or not the self-employed's benefits are hidden behind acceptable accounting measures. Certainly employers are given the opportunity to prove that further deductions from back-pay calculations need be made. <=28> Teichgraeber v. Memorial Union Corporation, 932 F. Supp. 1263, 1266 (D. Kan. 1996).[**16]

The net result is that a mitigation decision, presented to the jury as reasonable because plaintiff anticipated $ 35,000 to $ 45,000 per year in income, in fact resulted in a four-year average annual income of approximately $ 6,375 or less. n7 Plaintiff provided some explanation for his failure to meet projections (principally inflation) which underscores why the reasonableness of mitigation must be measured at the time of the decision and not with hindsight. The fact remains, however, that at best plaintiff's earnings were significantly less than ten percent of his previous annual earnings. As a consequence, we have a verdict of reasonable mitigation premised on $

45,000 income, allowing recovery of almost ninety-three percent n8 of the pre-termination [*1002] earnings, while plaintiff pursues what appears to be an unsuccessful farming venture.

I find that such a verdict is excessive and contrary to the law requiring an ongoing duty to mitigate. Given that the reasonableness of mitigation was premised on farm income of $ 35,000 to up to $ 75,000 per annum and that actual earnings were but a small fraction of those projected earnings, awarding damages for over four years on the basis of those actual earnings is simply unjust and shocks my judicial conscience, requiring a new trial or remittitur. See <=29> Malandris v. Merrill-Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152, 1168 (10th Cir. 1981).

As noted, the jury's award precisely tracks Dr. Lillydahl's testimony as to the particulars of lost earnings and dollars earned in mitigation. Defendant did not challenge those numbers. n9 Accordingly, [**18] I may order a new trial or remittitur because "the size of the verdict" does not turn "upon conflicting evidence and the credibility of witnesses," matters within the jury's exclusive province. Cf. <=30> Palmer v. Monticello, 31 F.3d 1499, 1508 (10th Cir. 1994).

Similarly, because the verdict is based on the precise testimony of plaintiff's expert, I do not conclude that the verdict is so excessive that it raises "an irresistible inference of passion, prejudice, corruption or other improper cause invaded the trial" requiring a new trial without the option of a remittitur. See <=31> Malandris, 703 F.2d at 1168.

Since I find that the verdict was not so tainted, I may, in my discretion, order a remittitur. Id.; <=32> Mason v. Texaco, Inc., 948 F.2d 1546, 1560 (10th Cir. 1991);[**19]

<=33> Blair v. Eagle-Picher Industries, Inc., 962 F.2d 1492, 1499 (10th Cir. 1992).

In deciding the amount of the remittitur, three difference approaches have been used:

. Lowest amount of damages supported by the record ("minimum recovery" rule);

. Highest legal amount of damages supported by the record ("maximum recovery" rule);

. Amount the court deems reasonable.

Moores Federal Practice, 3d Ed., @ 59.13[2][g][D].

I tend toward the latter, but there is at least a suggestion that the Tenth Circuit uses the "maximum recovery" standard. See <=34> K-B Trucking Co. v. Riss International Corp., 763 F.2d 1148, 1163 (10th Cir. 1985)(facts of that particular case were considered to require "maximum amount of damages that is reasonably supported by the evidence in the record"). Under the circumstances of this case I do not believe there is a bright line to distinguish a reasonable recovery from a "maximum recovery."

In my opinion the determination of the maximum, as well as the reasonable, recovery is necessarily linked to the ongoing duty of mitigation. I conclude that after two and one-half years n10 of extremely low earnings, [**20] plaintiff's farming enterprise was demonstrably unsuccessful, and his duty to mitigate damages required that he renew his search for comparable employment, which both experts concluded was available. <=35> Smith v. Great Western Restaurants, Inc., 969 F.2d at 439; <=36> Hansard v. Pepsi Cola Metropolitan Bottling Co., Inc., 865 F.2d at 1468.

[*1003] Using the uncontested methodology of Dr. Lillydahl, two and one-half years of damages are computed as follows:

Two and one-half years annual income of $ 71,400 =	$ 178,500
Less mitigation 1993, 1994 & 1995 ($ 200 + $ 15,000 less $ 1,500) n11 =	(13,700)
	164,800
Fringe benefits (20% of $ 164,800) =	32,960
	197,760
Liquidated damages multiplier	X2
TOTAL:	$ 395,520

[**21]

Accordingly, plaintiff shall be required to elect between a remittitur reducing the damage award against defendant to $ 395,520 or a new trial on the issue of damages. If plaintiff accepts remittitur, the verdict, as adjusted, will be affirmed.

A new trial on damages, if elected, shall include the issue of mitigation, which, in the oft-used phrase, is "inextricably intertwined" with the damage issue. n12 The new trial will be presented to the jury as a case where the defendant's liability for willful age discrimination is established as a matter of law, but the amount of damages, including the reasonableness of the defendant's mitigation efforts, shall be tried anew.

[**22]

It is therefore ordered as follows:

1. Defendant's motion to reverse the verdict on liability or order a new trial on that issue is denied.

2. Defendant's motion to reverse the verdict on willfulness or order a new trial on that issue is denied.

3. Defendant's motion for a new trial or for remittitur is granted. Plaintiff shall elect by written pleading, filed on or before December 18, 1998, either a remittitur of damages to reduce the judgment to $ 395,520 n13 or a new trial limited to the issue of damages, including mitigation. If plaintiff elects remittitur, judgment shall enter in that amount.

4. The reasons stated herein are additional reasons for my previous oral orders denying front-pay and prejudgment interest while granting liquidated damages.

Dated: December 8, 1998

BY THE COURT:

Walker D. Miller, Judge, United States District Court

n1 I note that defendant's motion was subject to my Order to Show Cause why the motion should not be stricken for its inappropriate statements. As suggested by the plaintiff, I will not penalize the defendant for its lawyer's improper advocacy by striking the motion. That matter, as well as the attorneys' fee issues, will be resolved by separate orders.

n2 Contrary to plaintiff's suggestion, the last option does not violate the Seventh Amendment's proscription against reexamining facts decided by a jury. Kennon v. <=12> Gilmer, 131 U.S. 22 (1889); <=13> Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 135 L. Ed. 2d 659, 116 S. Ct. 2211 (1996).

n3 The reasonableness of the self-employment decision must be determined as of the time of the decision and not with the benefit of 20/20 hindsight at some later time. This is consistent with the well-recognized rule that mitigation does not require success, but only an honest, good-faith effort. <=23> Brooks

v. Woodline Motor Freight, Inc., 852 F.2d at 1065; <=24> Smith v. Great American Restaurants, Inc., 969 F.2d at 438.

n4 Defendant now objects to plaintiff's expert's qualifications to render an opinion on mitigation and to the opinion itself because it allegedly dealt with the ultimate issue to be decided by the jury. Both arguments are without merit. Error cannot be predicated on evidence to which no objection was made. Rule 103(a)(1), Fed.R.Evid. Furthermore, expert opinion testimony, even on ultimate issues to be decided by the jury, is admissible. Rule 704(a), Fed.R.Evid.

n5 Dr. Lillydahl also opined that plaintiff could have earned approximately $ 45,000 if he had remained in the sales business in the United States.

n6 At the front-pay hearing plaintiff tendered his income tax returns which reported farm income for taxes as follows: 1993, $ 197.80; 1994, none submitted; 1995, ($ 1,520.71); and 1996, $ 1,812.98. Since these facts, or lack thereof, were not presented to the jury, they do not play a role in my decision.

n7 The actual annual earnings could be much less. If the income or loss actually shown on tax returns had been used, there may be no income at all. If the four years included 1993 and the estimated, but unsupported testimony of $ 15,000 earnings in 1994, the annual average would have been only $ 3,872.00. [**17]

n8 Plaintiff's testimony of a $ 324,900 loss was based upon 4.09 years of income at $ 71,400 per annum, plus twenty percent for fringe benefits. Accordingly, plaintiff's income had it continued with defendant would have been
$ 350,400, meaning that recovery of $ 324,900 provides him 92.7 percent of what his income would have been.

n9 Defendant's expert did not challenge Dr. Lillydahl's calculations, and he himself did not render an opinion on damages other than indirectly by opining that it should have taken plaintiff only about three months to find comparable work.

n10 This allows for completion of the 1993 crop year and the full years of 1994 and 1995 or 30 months to demonstrate unlikely success. The Smith court allowed the plaintiff there 34 months, although her revenues were increasing. <=37> 969 F.2d at 439.

n11 No evidence of 1993 income was presented at trial. At the front-pay hearing plaintiff's income tax return indicated $ 197.80 income. See footnote 6. I have rounded all figures to the nearest $ 100.

n12 I am aware that plaintiff might argue the proscription against a new trial where the size of the verdict is based upon conflicting evidence (Palmer v. City of Monticello) since defendant's expert opined, albeit as a bald conclusion, that plaintiff's mitigation efforts were not reasonable. I conclude that the Palmer rule does not apply here because there is no real dispute between the experts if one accepts the premise that plaintiff could have made $ 35,000 to $ 45,000. Any difference of opinion created by Laine's testimony is really unsupported opinion since he did not investigate the reasonableness of the plaintiff's projections. Application of Palmer to prevent relitigation of the reasonableness of mitigation in a damage trial is not appropriate where, as here, the actual damage calculation was not disputed.

n13 The judgment of $ 395,520 includes the doubling based on willfulness.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 94-WM-1697

Filed
United States District Court
Denver, Colorado
May 22 1998

ART MANNING,

Plaintiff,

James R. Manspeaker
Clerk

V.

By _____

McGRAW-HILL, INC., d/b/a KMGH- Channel 7,

Defendant.

JUDGMENT

On August 22, 1996, the Court granted motions for summary judgment on plaintiffs claims of breach of contract, promissory estoppel and intentional infliction of emotional distress/outrageous conduct and those claims were dismissed.

This matter was tried as to plaintiff's remaining claims of age discrimination and retaliation on April 28, 1997 through May 5, 1997, before a duly sworn jury of seven, the Honorable Walker D. Miller, Judge presiding.

The trial proceeded to conclusion and the jury rendered its verdict on special interrogatories as follows:

QUESTION 1. Do you find that Plaintiff has proven the claim of age discrimination against Defendant?

ANSWER **YES.**

QUESTION 2. Enter the amount of back pay to be awarded to Plaintiff.

ANSWER **$324,900**

QUESTION 3. Do you find the Defendant's discrimination on the basis of age against Plaintiff was "willful"?

ANSWER **YES.**

QUESTION 4. Do you believe that Defendant proved that Plaintiff failed to mitigate his damages?

ANSWER **NO.**

Pursuant to instruction, the jury proceeded to question 6.

QUESTION 6. Do you believe that Defendant retaliated against Plaintiff for his filing of charges of discrimination with the EEOC?

ANSWER **NO.**

Pursuant to instruction, no other questions were answered.

On May 8, 1998, the Court held a hearing on the issues of liquidated damages, prejudgment interest, front pay and attorneys' fees. The Court ruled that, pursuant to statute, plaintiff is entitled to liquidated damages in an amount equal to the award of back pay ($324,900) and the plaintiff is not entitled to prejudgment interest or front pay. The Court also found that plaintiff is entitled to attorneys' fees but reserved

ruling on an amount until the parties' supplemental filings are complete.

Accordingly, it is **ORDERED:**

1. Judgment is entered in favor of the plaintiff Art Manning and against the defendant McGraw-Hill on plaintiff's claim of age discrimination.

2. Judgment is entered in favor of the plaintiff Art Manning and against the defendant McGraw-Hill on plaintiff's claim of age discrimination, in the amount of Three Hundred Twenty-Four Thousand, Nine Hundred dollars ($324,900) for compensatory damages.

3. Judgment is entered in favor of the plaintiff Art Manning and against the defendant McGraw-Hill, upon the jury's finding that defendant's discrimination was willful, for liquidated damages in the amount of Three Hundred Twenty-Four Thousand, Nine Hundred dollars ($324,900).

4. Judgment is entered in favor of defendant McGraw-Hill and against plaintiff Art Manning on plaintiff's claim of retaliation.

5. Judgment is entered in favor of defendant McGraw and against plaintiff Art Manning on plaintiff's claims for front pay and prejudgment interest.

6. Post judgment interest shall accrue on the total judgment from the date of entry of judgment, at the legal rate of 5.407% percent.

7. Plaintiff Art Manning may have allowable costs from defendant McGraw-Hill, upon the filing of a Bill of Costs within ten days of entry of this judgment.

DATED at Denver, Colorado this 21st day of May, 1998.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

By: /s/ STEPHEN P. EHRLICH
Chief Deputy Clerk

APPROVED:

/s/ WALKER D. MILLER

U.S. District Judge

ENTERED
ON THE DOCKET

MAY 2 1998
JAMES R.
MANSPEAKER
CLERK

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ART MANNING, Plaintiff-Appellee v. MCGRAW-HILL, INC., Defendant-Appellant.	Nos. 99-1010, 99-1029, and 99-1030

ORDER
Filed July 19, 2000

Before **BALDOCK, KELLY,** and **BRISCOE**, Circuit Judges.

Appellant, Art Manning's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular service as required by Fed.R.App. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

PATRICK FISHER, Clerk of the Court

By: /s/ K. Fabrizio

Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ART MANNING,	)	RECEIVED U.S. COURT OF APPEALS 10TH CIRCUIT
Plaintiff-Appelle-Cross-Appellant,	)	00 JUNE 27 PM 3:38
v.	)	Nos. 99-1010, 99-1020, 99-1130
MCGRAW-HILL, INC.,	)	
Defendant-Appellant-Cross-Appellee	)	

On Appeal and Cross-Appeal from the United States District Court for the District of Colorado,
Honorable Walker D. Miller, Presiding

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

MILLER, LANE, KILLMER & GREISEN, LLP
Paula Greisen
David A. Lane
John T. Carlson
730 Seventeenth Street #600
Denver, CO 80202
(303) 534-6400

ATTORNEYS FOR PLAINTIFF ART MANNING

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Rule 40, Fed.R.App.P. ..... 40 a

Under Rules 35 and 40 of the Federal Rules of Appellate Procedure, the Appellee, Art Manning respectfully petitions this Court to grant rehearing with a suggestion for rehearing en banc. As required by the 10th Cir. R. 35.2:

Undersigned counsel expresses a belief based on a reasoned and studied professional judgment that the panel decision is contrary to the following decision of the United States Supreme Court and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

Reeves v. Sanderson Plumbing Products Inc., __ U. S. __, 2000 U.S. LEXIS 3966 (No. 99-536, June 12, 2000 (Attachment B).

STATEMENT OF THE CASE

For more than thirteen years, Art Manning worked for Appellant/Defendant McGraw-Hill at Channel 7-KMGH as an account executive selling television advertising since 1979. For twelve of those years, Manning was esteemed for his outstanding work. He consistently received outstanding performance evaluations, exceeded sales targets and receiving recognition for his dedication and outstanding efforts.

Things took a dramatic turn for the worse in 1991 when new management arrived at Channel 7. This new management began eliminating older workers from the sales department and hiring younger employees.[1] After terminating the local sales manager, Larry Grall, the marketing manager, Leonard Marsh, and Pete Remert, a senior sales executive, all of who were over the age of 40, their attention turned to Manning, age 49.

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[1] Eight of the nine new hires in the sales department hired by this management were under forty. The only individual over forty was hired after the initiation of this suit.

The systematic effort to get rid of Mr. Manning began by stripping him of his three largest accounts, all of which were given to younger employees. Following a steady campaign of mounting criticism by his direct supervisor, James Sieke, and accompanied by several age biased comments by Mr. Sieke, Defendant fired Manning.

Manning filed suit against Defendant, alleging that his termination violated the Age Discrimination in Employment Act. After a five-day trial in 1997, the jury agreed and awarded Manning damages of $324,900 and also concluded that Defendant's conduct was willful.

Defendant filed post-trial motions seeking judgment as a matter of law or alternatively a new trial. The district court denied the motions, though it did issue a remittitur, forcing Mr. Manning to elect between a reduced damages award or a new trial on damages. Mr. Manning chose the remittitur.

Defendant appealed to this court, arguing that there was insufficient evidence to support the jury's verdict. The panel accepted Defendant's position, ruling that the district court erred in denying the company's Rule 50 motion for judgment as a matter of law, and reversed the jury's verdict. (Slip Opinion, Attachment A) The United States Supreme Court decided *Reeves* only one day prior to the panel decision; thus, this is the first opportunity to explain to the Court why *Reeves* mandates affirmance of the verdict.

ARGUMENT

In *Reeves*, the United States Supreme Court unanimously held that a plaintiff's prima facie case, combined with evidence of pretext and indirect evidence of age based animus, was sufficient for a finding of liability. In so doing, the *Reeves* Court sent a clear message that reviewing courts

should be deferential to a jury's findings in such cases, stating that

> although the [lower] court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. (citation omitted) That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses. (citation omitted) *Id.* at *31-32 (emphasis added).

Despite its clear implications for this case, *Reeves* was not cited by the panel decision. Contrary to the dictates of *Reeves*, the panel decision gave substantial weight to controverted defense evidence and ignored critical evidence favoring Mr. Manning. The panel's analysis was strikingly similar to the Fifth Circuit's analysis that was rejected in *Reeves*.

Fifth Circuit Decision in *Reeves*

Reeves, 57 years old, was fired from Sanderson Plumbing Products. At trial, Sanderson argued that it fired Reeves because he failed to maintain accurate attendance records, but Reeves countered with evidence showing that his record keeping, in fact, was proper and, contrary to the company's assertions, he had never falsified any information. The jury returned a verdict in favor of Reeves.

The Fifth Circuit reversed, holding that Reeves had not introduced evidence sufficient to sustain the jury's finding of unlawful discrimination. *Reeves v. Sanderson Plumbing Products*, 197 F. 3d 688, 694 (5th Cir. 1999). Specifically, the Fifth Circuit stated that several age-related comments by a

Sanderson manager were isolated remarks that were not sufficiently connected with Reeves' dismissal to establish that the decision itself was discriminatory. It also said that there was no evidence that other managers involved in Reeves' termination were motivated by age. Finally, the court noted, two of the decision-makers responsible for Reeves' discharge were over the age of 50. *Id.* at 693-94. For these reasons, the court concluded Reeves had not presented sufficient evidence for a rational jury to find that he had been discharged because of his age. *Id.* at 694.

Supreme Court Decision

The Supreme Court rejected the Fifth Circuit's reasoning and reinstated the jury's verdict in favor of Reeves. In so doing, the Court squarely rejected the notion that Reeves had not produced sufficient evidence of discrimination, stating that "the Court of Appeals ignored the evidence suggesting petitioner's prima facie case and challenging respondent's explanation for its decision." *Reeves*, *supra*, at *25.

Specifically, in rebuking the court of appeals for its cramped view of the record, the Supreme Court said that the lower court "misconceived" the evidentiary burden placed on plaintiffs who attempt to prove intentional discrimination through indirect evidence. *Id.* at *26. Importantly for the present case, the Court went on to criticize the Fifth Circuit for confining its review to the age-related comments and the evidence that Reeves was singled out for harsher treatment.

Reeves carefully explained why evidence of pretext is so probative of intentional discrimination, stating that the jury can reasonably infer from the falsity of the employer's explanation that the employer is "dissembling to cover up a discriminatory purpose." *Id.* at *28. Once an employer's justification has been discredited, "discrimination may well be the most likely alternative explanation." *Id.*

Underscoring the importance of pretext evidence, the Court made it clear that it should be rare that a jury verdict is overturned if a there is sufficient evidence of pretext to submit the question to the jury. The Court cited only two such extreme examples: (1) where the record "conclusively" shows another, nondiscriminatory reason for the employer's decision; or (2) if the plaintiff's evidence of pretext is weak and there was "abundant and uncontroverted independent evidence" that discrimination did not occur. *Id.* at *29. In the concurring opinion, Justice Ginsburg warned appellate courts against overturning jury verdicts in cases built upon indirect evidence, stating that the circumstances in which plaintiffs will be required to submit evidence beyond their prima facie case and pretext "will be uncommon." *Id.* at *40. (Ginsburg, J., concurring).

Similarities With Lower Court Decision in *Reeves*

In striking ways, the panel's decision here mirrors the Fifth Circuit's analysis which was rejected in *Reeves*. In this case, as in *Reeves*, Defendant's evidence in support of Mr. Manning termination consisted solely of testimony by its own employees. On the other hand, Mr. Manning submitted evidence contradicting the Defendant's reason through not only his own testimony, but also the testimony of his former managers and most importantly, the testimony of objective, disinterested third parties – the Defendant's own customers. Although Defendant's management claimed that Mr. Manning was not properly servicing these clients – the clients themselves contradicted these claims of poor service and in fact, testified that he was one of their best account executives. The panel decision, however, discounted the importance of this testimony, stating that "it did not contradict the [defendant's] belief that Mr. Manning failed to meet expectations." This "finding" was never argued at trial by the Defendant and is merely a substitution of the panel's judgment for that of the jury.

Like the Fifth Circuit, the panel decision discounted the various age-related comments introduced at trial by Sieke, dismissing them as being too far removed from Manning's termination and doubting that the person who made the statements was the true decision-maker. In fact, the panel decision stated that Westerkamp and Proffitt, not Sieke, were the decision-makers. This ignores the evidence that Sieke was Mr. Manning's direct supervisor (Vol. I, p. 156); that Sieke was the person who conducted Mr. Manning's performance evaluations (Vol. I, pp. 184, 187); that Sieke and Westerkamp made the decision to counsel Manning (Vol. I, p. 178); and it was Sieke who fired Mr. Manning. (Vol. I, p. 191.) In fact, Defendant never even argued at trial or on appeal that Mr. Sieke was not a "decision-maker" – because the evidence clearly showed that he participated in every adverse employment decision taken with respect to Mr. Manning. Clearly, the panel decision did not view this evidence in the light most favorable to Mr. Manning.

Both the Fifth Circuit and the panel decision in this case discounted the notion that the actions by and against other employees revealed age bias. In *Reeves*, the lower court pointed out that at least two of the decision-makers involved in Reeves' termination were over the age of 50 and that several management positions at the firm were similarly filled by persons older than 50. Here, although evidence was submitted by Manning that Larry Grall and Leonard Marsh were also discharged because of their age, the panel credited the non-independent position of company management who provided neutral reasons for these terminations - that Larry Grall was fired because of a "change in job requirement" and that Leonard Marsh's position was subject to a "RIF" and his job was "eliminated." (Plaintiff's Exhibit 14.) These employees testified that these "facially-neutral" reasons were false and that their age was a factor in their termination. (Vol. I, pp. 205-06, 323-24.) Upon cross-examination, although the station manager John Proffitt first stated Grall was fired because of a "change in job requirements," when confronted with the fact

that the position's responsibilities had not changed after Grall was fired, Proffitt then testified that Grall was fired because they wanted someone different in that position – the significantly younger Westerkamp. (Vol. I, p. 218.)

Similarly, Proffitt testified that Marsh was terminated for the facially neutral reason that his job of business development (he developed new business for the company) was "eliminated." This explanation was impeached when Proffitt was forced to admit that Defendant had hired a "marketing director" whose job was to "generate new revenue streams" – the same job responsibility performed by Marsh. (Vol. I, p. 221.) The panel credited only Defendant's explanation for the termination of these individuals, completely ignoring Mr. Manning's evidence.[2]

The Panel's Decision Failed to Properly Credit Mr. Manning's Other Evidence of Pretext.

The panel failed to heed Reeves' directive to disregard all evidence favorable to the moving party that the jury is not required to believe. *Reeves*, *supra*, at *34.

Specifically, the panel completely credited the Defendant's position that Mr. Manning was terminated because 1) he had negotiated a lower rate for Toyota allegedly without necessary management approval; 2) that his accounts were transferred because he had "underperformed" on them and the accounts did better after they were reassigned; and 3) that Mr. Manning received low evaluation scores because management alleged that he failed to meet certain goals – such as providing good customer service. As discussed below,

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[2] The Court mistakenly said that Manning attempted to prove "widespread, age-related firings at the station." In fact, the district court precluded Mr. Manning from introducing evidence of other individuals over the age of forty who were terminated by Defendants, instead limiting the evidence to only terminations within the sales department. (Vol. I, pp. 273, 364.)

evidence was provided to the jury that these reasons were false, that Mr. Manning was providing excellent customer service, and that Defendant's attempt to argue that the accounts did better after they were reassigned was purposely misleading.

1. Going "Off the Rate Card"

The panel decision credited Defendant's position that the Toyota account was taken from Mr. Manning because he had offered discounted rates to Toyota (going "off the rate card") without obtaining proper management approval, a step called a "serious" act of insubordination. (Vol. I, pp. 275, 307.) Manning testified that at the time he offered these discounted rates he had been instructed by management to get Toyota's business at any price and that he did not believe he needed to obtain pre-approval form management. (Vol. I, p. 275.) Even Sieke admitted that he did not recall telling the sales executives that they needed such prior approval. (Vol. I, p. 195.) When Manning offered the rates, management did not complain. In fact, it was not until months later, *after Manning filed a charge of discrimination with the EEOC*, that the rate became a "serious offense" and was reduced to writing for the first time by Defendant. (Vol. I, pp. 239, 275.) The client who handled the Toyota account, Mary Beth Lynch-McGrath, also denied that Mr. Manning had undersold the time. Instead, she testified that the rate Manning offered was "competitive" and explained that it was at the "same cost per point anyone else in the market was charging for a similar product." (Vol. I, p. 262.) Her testimony was not impeached by the Defendant.

2. *Account Performance*

At trial, Sieke testified that in March of 1992 he took away Manning's three largest accounts (Coca-Cola, Lexus and Toyota) because Manning had underperformed on the accounts in 1991. However, just weeks after the removal of these accounts, Westerkamp gave Manning a job evaluation for his performance in 1991 stating that stated he "fully met expectations" was "maximiz[ing] KMGH's share of business"

on his accounts, had achieved acceptable shares on his accounts and met his budget goals for that year. (Vol. I, pp. 241-42; Vol. II, p. 516.) Larry Grall, Mr. Manning's direct supervisor for the first three quarters of 1991 testified that throughout that time, Mr. Manning was one of the best account executives at the station. (Vol. I, p. 203.) Moreover, when Sieke took these accounts away from Manning, he did not say that it was a performance-related problem, but only that the reassignment would "free up" his time to develop other business. (Vol. I, p. 274.) Westerkamp further contradicted Sieke's reasons for reassigning the Coca-Cola account, stating that the main reason the account was taken away was not for performance-related reasons. (Vol. I, pp. 234-35.)

At trial, Mr. Manning submitted evidence that the Defendant had compiled purposefully misleading statistics in order to show that the performance on these accounts improved after they were reassigned. Westerkamp prepared a memorandum that reportedly detailed how "dramatically" certain accounts, such as the Toyota account, improved after they were removed from Manning's care. (Plaintiff's Exhibit 9.) Under cross-examination Westerkamp admitted that he failed to properly "credit" Mr. Manning for a large increase in revenues attributable to the accounts, (Vol. I, p. 238) and that it was Manning's performance during the first part of 1992 on those accounts that was the reason the accounts showed an increase for that year. (Vol. I, p. 162-163.) Confronted with this misrepresentation, Sieke admitted that this was not a fair accounting of Manning's performance. (Vol. I, p. 163.) The panel ignored this evidence, instead citing only that evidence that supported the Defendant's position.

3. *Performance Reviews*

The Defendant submitted a myriad of explanations why Manning's performance was allegedly unacceptable. Manning was "graded" during his performance evaluations on a variety of primarily subjective factors – such as making oral presentations to the clients. Specifically, Westerkamp claimed

that Manning did not put the station in a favorable light to the clients, such as Ms. McGrath. (Vol. II, p. 231.) Ms. McGrath testified, however, that Manning never put the station in an unfavorable light. (Vol. I, p. 259.) Ms. McGrath, an experienced media buyer, testified that throughout the time Manning worked on her accounts he was one of her best account representative, that he did a "great job" and was in the top ten percent of all the representatives with whom she worked. (Vol. I, pp. 259-60.) In fact, Ms. McGrath testified that although Megan Back, the younger account representative who Defendant assigned to her account after taking it away from Manning, was one of her "best friends," Ms. McGrath stated that Back did not provide any better service on the account than had Manning. (Vol. I, p. 260.)

Similarly, Westerkamp also told jurors that Manning had a "lack of contact" with Tom McCarthy. (Vol. I, p. 232.) McCarthy testified, however, that Manning was in constant communication with him, and further that Manning consistently offered excellent customer service. (Vol. I, pp. 147.) During his performance reviews, Westerkamp criticized Manning for allegedly failing to set up meetings between the managers and customers. (Vol. I, p. 256.) One of these customers, Albert Knittle, testified that although several of these meetings were arranged by Manning, Westerkamp simply failed to appear – without explanation. (Vol. I, pp. 145-46.) The panel ignored all of this evidence that Defendant's asserted reasons that Manning was underperforming were false, finding only that it did not contradict Defendant's "belief" that Manning failed to meet expectations.

4. Negative Performance Evaluations

Similarly, rather than citing the evidence that Manning's performance was outstanding in 1990 and 1991, the panel focused solely on the Defendant's evidence that he did not perform well during those years. Yet Larry Grall testified that in 1990 and 1991, Manning's performance was very good,

one of the best, and that he met and often exceeded his goals. (Vol. I, p. 202-203.) In fact, even Westerkamp admitted that Manning's performance in 1991 "fully met expectations." (Vol. II, p. 516.)

The panel also pointed to low performance evaluations submitted by Defendants – evaluations in which no explanation was offered for the grading system other than the goals were mysteriously "weighted." The jury heard testimony revealing that these critiques were unfair and misleading – evidence that the panel completely ignored.

For instance, Defendant asserted that in the first quarter of 1992, Manning received a score of "5.5" out of a possible 10 and hence only achieved "55%" of his goals. (Vol. I, p. 176.) But this review had a total of 25 goals[3] and its notes indicate that Manning achieved all but 8 of the goals. Thus, he met over two thirds of his goals for this quarter and still his performance was 55%. (Vol. I, p. 176; Plaintiff's Exhibit 11.) Similarly, Defendant argued (and the panel accepted) that Manning received a score of only 4 out of a possible 10 on his second quarter goals for 1992, and thus only achieved 40% of his goals. (Vol. I, p. 177; Defendant's Exhibit 9.) This evaluation contains 11 goals and Manning achieved 7 out of 11 goals. Rather than interpreting this as a score of "7 out of 11," Defendant asserts he only achieved "40%" of his goals.

In the third quarter of 1992, Manning achieved 13 out of 16 listed goals (Vol. I, pp. 178-79; Defendant's Exhibit 14). Nonetheless, instead of receiving a score of over 80%, he was given a "6," which Defendant insisted meant he only achieved "60%" of his goals. No explanation as to how Defendant scored these goals was offered. Manning repeatedly stated that he did not know how Defendant arrived at these scores and that

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[3]Although this exhibit only specifically lists 18 goals, the two goals listed under "New Business" actually include a combined total of 9 additional goals. (Plaintiff's Exhibit 11.)

he did not believe they were fair. (Vol. I, pp. 276-77.)[4] The unfairness of the evaluations were shown to the jury which had a right to discredit Defendant's scoring – and did so. The jury was also properly instructed that it was not to second-guess the legitimate business concerns of the Defendant and decided that these unfair criticisms were not such "legitimate concerns." (Instruction No. 24, Vol. II, p. 470.) The panel impermissibly substituted its judgment for the jury's in accepting Defendant's position.

In *Reeves*, the United States Supreme Court stated that the Fifth Circuit "disregarded critical evidence favorable to the petitioner – namely the evidence supporting the petitioner's prima facie case and undermining respondent's nondiscriminatory explanation. The court also failed to draw all reasonable inferences in favor of the petitioner." *Reeves, supra*, at *17. In so doing, "the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's." *Id.* at *18.

In this case, in addition to his prima facie case, Manning submitted evidence that his performance continued to be outstanding throughout his career, that the criticism by management were untrue, that he properly serviced his clients, that there was a pattern of eliminating older workers and hiring younger workers in his department, and that at least one of the decision makers made age biased comments. In disregarding this evidence, the panel decision committed the same error as the Fifth Circuit. Importantly, the jury was properly instructed in this case that Manning must prove by a preponderance of the evidence that age was a determining factor in his discharge. (Instruction No. 2, Vol. 2, p. 444). The jury was also told that in order to show that Defendant's explanation was a pretext for discrimination, Manning had to show by a preponderance that the reasons given were phony or unworthy of belief.

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[4] *See Burrus v. United Tel. Co. of Kansas.*, 683 F. 2d 339, 342 (10th Cir. 1982) (use of subjective factors in decision process can create an inference of discrimination).

(Instruction No. 20, Vol. 2, p. 466). Given that there is sufficient evidence in the record that Mr. Manning not only met his prima facie case but also that he adduced sufficient evidence to submit to the jury that Defendant's reasons were pretextual, the verdict should be affirmed.

CONCLUSION

The decision of the panel should be vacated and the jury verdict affirmed.

Respectfully Submitted this 27th day of June, 2000.

MILLER, LANE, KILLMER & GREISEN, LLP

/s/Paula Greisen
David A. Lane
730 Seventeenth Street #600
Denver, CO 80202
(303) 534-6400

ATTORNEYS FOR ART MANNING

CERTIFICATE OF SERVICE

I certify that I have placed in the U.S. Mail, postage prepaid this 27th day of June, 2000, a true and correct copy of the foregoing Petition For Rehearing En Banc addressed as follows:

Karen E. Ford, Esq.
Franklin A. Nachman, Esq.
Littler Mendelson, P.C.
1200 Seventeenth Street #2850
Denver, CO 80202-5835

/s/ Paula Greisen

APPENDIX G

FILED
UNITED STATES DISTRICT
COURT
DENVER, COLORADO

MAY – 5 1997
JAMES R. MANSPEAKER
CLERK
BY _____
DEP. CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 94-WM-1697

ART MANNING,

Plaintiff,

V.
MCGRAW-HILL, INC., d/b/a KMGH-Channel 7,

Defendant.

JURY VERDICT FORM

You are instructed to answer the following questions:

1. Do you find that Plaintiff has proven the claim of age discrimination against Defendant?

___X___Yes

_____No

IF YOUR ANSWER IS YES, THEN ANSWER QUESTIONS 2, 3 and 4. IF YOUR ANSWER IS NO, THEN PROCEED DIRECTLY TO QUESTION 6.

2. Enter the amount of back pay to be awarded to Plaintiff.

$ 324,900

3. Do you find that the Defendant's discrimination on the basis of age against Plaintiff was "willful"?

___X___ Yes

_____ No

4. Do you believe that Defendant proved that Plaintiff failed to mitigate his damages?

_____ Yes

___X___ No

IF YOUR ANSWER IS YES, THEN ANSWER QUESTION 5. IF YOUR ANSWER IS NO, THEN PROCEED TO QUESTION 6.

5. Please enter the amount, if any, by which Plaintiffs damages should be reduced due to his failure to mitigate.

$ _____

6. Do you believe that Defendant retaliated against Plaintiff for his filing of charges of discrimination with the EEOC?

_____ Yes

___X___ No

IF YOUR ANSWER IS YES, THEN ANSWER QUESTIONS 7, 8, and 9. IF YOUR ANSWER IS NO, THEN DO NOT ANSWER THE REMAINING QUESTIONS.

7. Please enter the amount of damages to be awarded to Plaintiff due to Defendant's retaliation against him.

$ _____

8.. Do you find that Defendant's retaliation against Plaintiff was willful? Yes No

_____Yes

_____ No

9. Do you believe Defendant proved Plaintiff failed to mitigate his damages?

_____Yes

_____ No

IF ANSWER IS YES, THEN ANSWER QUESTION 10. IF YOUR ANSWER IS NO, THEN DO NOT ANSWER QUESTION 10.

10. Please enter the amount, if any, by which Plaintiffs damages should be reduced due to his failure to mitigate.

$ _____

PLEASE SIGN THIS VERDICT FORM

Dated this 5 day of May, 1997.

/s/ FOREPERSON

ENTERED ON THE DOCKET

MAY 07 1997

JAMES R. MANSPEAKER
CLERK

By /s/_____